COVINGTON & BURLING LLP

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662.6291
WWW.COV.COM

BEIJING
BRUSSELS
LONDON
NEW YORK
SAN DIEGO
SAN FRANCISCO
SILICON VALLEY
WASHINGTON

ROBERT K. KELNER
TEL 202.662.5503
FAX 202.778.5563
RKELNER @ COV.COM

June 22, 2012

BY HAND DELIVERY

Mr. Anthony Herman
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Matter Under Review 6563

Dear Mr. Herman:

We write on behalf of our client, Representative Aaron Schock, in response to the complaint filed in the above-captioned Matter Under Review. The complaint alleges that a communication from Rep. Schock to House Majority Leader Eric Cantor was impermissible under 2 U.S.C. § 441i(e)(1)(A), which restricts solicitations by federal officeholders of funds that are not subject to the limitations, prohibitions, and reporting requirements of the Federal Election Campaign Act ("FECA"). The communication addressed in the complaint was not a "solicitation" within the meaning of the Commission's regulations, and the complaint could and should be dismissed on that narrow ground. Even if it were deemed to be a "solicitation," however, the officeholder solicitation restrictions in § 441i(e) do not apply here.

Rep. Schock suggested a fundraising target to Rep. Cantor, and Rep. Cantor apparently met that target with a donation from his federal leadership PAC that consisted solely of funds that were raised subject to the limitations, prohibitions, and reporting requirements of FECA. Members frequently set such fundraising targets for one another, especially in the context of fundraising for the national party committees of both political parties. If the Commission nonetheless were to construe § 441i(e) to apply to the Member-to-Member communication that is at issue here, doing so would violate the First Amendment to the U.S. Constitution because no risk of corruption exists when, as happened here, one Member asks another Member to meet a fundraising target, and the other Member does so by tapping hard money sources.

For these reasons, we respectfully request that the Commission dismiss the complaint.

I. Background

The Illinois Republican primary between Adam Kinzinger and Representative Don Manzullo appeared to be a close race in the weeks prior to the March 20, 2012 election. Rep. Schock supported Mr. Kinzinger in the race and sought to assist Mr. Kinzinger in his challenge to Rep. Manzullo. Rep. Schock learned of advertisements that the Campaign For Primary Accountability ("CPA"), an anti-incumbent independent expenditure-only committee, had aired against Rep. Manzullo, and believed that CPA needed additional funds to be able to air the advertisements again prior to the election.

Shortly before the March 20 election, Rep. Schock learned that the 18th District Republican Central Committee ("18th District Committee"), a local political party committee in Illinois, was planning to make a $25,000 donation to CPA from its federal account. Rep. Schock helps raise funds for the 18th District Committee's federal account through the Schock Victory Committee, an FEC-registered joint fundraising committee. Rep. Schock is associated with the 18th District Committee through this fundraising connection, but he does not hold any positions on the committee and does not have the authority to make decisions concerning how the committee spends its funds.

With knowledge of the $25,000 commitment from the 18th District Committee, Rep. Schock reached out to Rep. Cantor to see if Rep. Cantor could raise additional funds to support pro-Kinzinger ads by CPA. As reported in the *Roll Call* article upon which the complaint is based, Rep. Schock spoke with Rep. Cantor about the tight Illinois race and CPA's efforts and said something along the lines of "Look, I'm going to do $25,000 for the Kinzinger campaign for the television campaign ... Can you match that?"[1] Rep. Schock knew that Rep. Cantor might have several options for tapping federal funds that could be used to make a contribution to CPA. For example, Rep. Cantor could authorize contributions to CPA from his candidate committee or his leadership PAC. He could also raise funds from his own network of hard money donors. He could have met the $25,000 target suggested by Rep. Schock in any number of different ways, tapping one or more sources of funds, and relying exclusively on hard money sources. Rep. Schock did not learn that a $25,000 contribution was made from ERIC PAC, Rep. Cantor's federal leadership PAC, until after the March 20 election.

Based solely on the quote in *Roll Call*, the Campaign Legal Center filed a complaint with the Commission alleging that Rep. Schock's communications with Rep. Cantor

---

[1] Jan Stanton, *Eric Cantor Gave $25K to Anti-Incumbent PAC to Aid Adam Kinzinger*, Roll Call, April 6, 2012. While Rep. Schock likely did say something along the lines of "I'm going to do $25,000," he had in mind his knowledge that the 18th District Committee, for which he raised funds, intended to make a $25,000 contribution to CPA. The Roll Call article incorrectly stated that Rep. Schock's leadership PAC made a $25,000 contribution to CPA.

violated the soft money solicitation provisions found in 2 U.S.C § 441i(e)(A)(1), as interpreted by FEC Advisory Opinion 2011-12 (Majority PAC).

II. Applicable Law

The Bipartisan Campaign Reform Act of 2002 ("BCRA") established limitations on the solicitation of soft money donations by national political party committees and federal officeholders. *See* 2 U.S.C. § 441i(a), (e). BCRA amended FECA to provide that a federal officeholder shall not "solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act." *Id.* § 441i(e)(A).

With regard to the limits placed on the solicitation of funds, Commission regulations define "to solicit" to mean:

> to ask, request, or recommend, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value. A solicitation is an oral or written communication that, construed as reasonably understood in the context in which it is made, contains a clear message asking, requesting, or recommending that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value. A solicitation may be made directly or indirectly. The context includes the conduct of persons involved in the communication. A solicitation does not include mere statements of political support or mere guidance as to the applicability of a particular law or regulation.

11 C.F.R. § 300.2(m).

Section 441i(e) focuses on the solicitation of donations by elected officials. Because § 441i(e) was enacted prior to the U.S. Supreme Court's decision in *Citizens United v. FEC*, and other decisions that led to the establishment of independent expenditure-only committees, neither § 441i(e) nor any other FECA provision or Commission regulation address how an officeholder's solicitation for independent expenditure-only committees should be treated under the law.

In Advisory Opinion 2011-12 (Majority PAC), the Commission considered the application of BCRA's soft money solicitation restrictions to solicitations for federally registered independent expenditure-only committees. The Commission concluded that federal officeholders and candidates may not solicit unlimited funds for independent expenditure-only committees, but may solicit up to $5,000 per calendar year from permissible sources, which corresponds to the limit placed on contributions to traditional multicandidate committees. *See*

AO 2011-12 (Majority PAC), at 3-4. The Commission reached that conclusion even though independent expenditure-only committees are subject to no limits on donations. The absence of a limit on donations suggests that even the solicitation of a specific sum that exceeded $5,000 would be a solicitation of funds that are "subject to the limitations, prohibitions, and reporting requirements of this Act" because no limitation or prohibition would apply to the funds. The Commission has sufficient grounds to dismiss the complaint in this matter without needing to revisit its conclusion in Advisory Opinion 2011-12, however.

III. Analysis

A. Representative Schock's communication with Representative Cantor was not a solicitation under FEC regulations

Representative Schock spoke with Rep. Cantor about fundraising efforts for a primary election in Illinois involving a candidate both individuals supported. During this conversation, however, Rep. Schock did not "solicit" a contribution from Rep. Cantor, as alleged in the complaint, within the meaning of Commission regulations. The Commission should dismiss the complaint on this narrow ground, removing the need to reach any broader issues.

Rep. Schock did not "ask, request, or recommend" that Rep. Cantor "make a contribution" from his own funds or from any particular committee he controlled, and therefore he did not "solicit" Rep. Cantor under § 300.2(m). Instead, Rep. Schock asked whether Rep. Cantor could match a fundraising target of $25,000. Rep. Schock approached Rep. Cantor after he learned that a local political party committee intended to make a permissible $25,000 contribution to CPA. Rep. Schock intended to inquire whether Rep. Cantor could raise similar funds for CPA. Rep. Schock knew that Rep. Cantor had a number of ways to raise funds for this purpose, and he did not specifically ask for or expect that support would originate from any particular source. Section 300.2(m) covers requests to "make a contribution" and not a simple request to raise funds that might result in contributions from others.

Members of Congress, particularly those who are raising funds for the national party committees of both parties, routinely set fundraising targets for one another. When such targets are set, individual Members are left to decide how best to meet those targets, whether through contributions from committees they control or with federal funds they solicit from others.

When Rep. Schock said something along the lines of "I'm going to do $25,000 for the Kinzinger campaign ... Can you match that?," he was not saying that he had made a contribution of that size, because he had not. That $25,000 commitment was not from Rep. Schock or any committee controlled by him, but from the 18th District Committee, which shared his interest in supporting Mr. Kinzinger. Therefore, a request to "match that" or "do that" was not a specific request for Rep. Cantor to "make a contribution" from his own funds or from a committee he controls. "Construed as reasonably understood in the context in which it is made,"

which in this case is a Member speaking with a Member about organizing support for a candidate, this communication did not contain "a clear message asking, requesting, or recommending that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value." *See* 11 C.F.R. § 300.2(m). As recognized by the Commission, "[t]he context of a communication is often important because ... words that would by their plain meaning normally be understood as a solicitation, may not be a solicitation when considered in context." *Definitions of "Solicit" and "Direct,"* 71 Fed. Reg. 13926, 13929 (March 20, 2006) (Explanation and Justification for 11 C.F.R. § 300.2(m), (n)).

While the definition of "to solicit" includes solicitations "made directly or indirectly," the use of "indirectly" was not intended to cover communications to an individual about engaging in fundraising that could in turn lead to multiple permissible solicitations of others. The FEC's original definition of "to solicit" in § 300.2(m) was found by the U.S. Court of Appeals for the D.C. Circuit to be too narrow because it did not reach "indirect" solicitations. *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005). What the court was concerned with, however, was *not* communications about fundraising efforts that could lead a listener to make several permissible requests. The D.C. Circuit was primarily concerned that the original definition of "to solicit" would allow politicians to "rely on winks, nods, and circumlocutions to channel money in favored directions—anything that makes their intention clear without overtly 'asking' for money." *Id.*, at 106.

The FEC subsequently added "indirectly" to the definition of "to solicit" to address the issue of the covert ask. 71 Fed. Reg. 13926, 13928. Rep. Schock's communication with Rep. Cantor about finding support for Mr. Kinzinger was not an attempt to covertly or "indirectly" request a contribution from Rep. Cantor personally. He was clearly asking Rep. Cantor to raise funds for CPA's ads in support of Mr. Kinzinger, and he said so directly. He neither expressed nor even had a preference as to how Rep. Cantor would raise the funds. Therefore, under § 300.2(m), Rep. Schock's request to Rep. Cantor was neither a direct nor an indirect solicitation.

B. BCRA's soft money solicitation restrictions do not apply to Member-to-Member communications

In *McConnell v. FEC*, 540 U.S. 93 (2003), the Supreme Court reviewed challenges to BCRA, including to the national party and officeholder soft money solicitation restrictions in 2 U.S.C. § 441i. The Court upheld the solicitation restrictions, reasoning that the governmental purpose in preventing corruption caused by soft money solicitations justified the limitations. *McConnell*, 540 U.S. at 154-61, 181-84. The core anti-corruption purposes of the law simply do not apply to Member-to-Member activity, however. Indeed, applying the solicitation restrictions of BCRA to a Member-to-Member solicitation of federal funds would violate the First Amendment because of the absence of any risk of corruption.

The *McConnell* Court found that BCRA's soft money restrictions were constitutionally justified by the Government's "important interest in preventing corruption and the appearance of corruption." *Id.* at 142. The Court focused on forms of corruption that BCRA's soft money solicitation restrictions attempt to prevent, none of which apply to Member-to-Member fundraising communications, particularly where the funds at issue are federally regulated and reported contributions.

With regard to officeholder solicitations, the Court found that "[l]arge soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder." *Id.* at 182. As the district court in *McConnell* recognized, the focus here is on the potential corruption through solicitation of contributions from *public donors*: "it is hardly a novel or implausible proposition that a federal candidate's solicitation of large donations from *wealthy individuals, corporations and labor organizations*—whether or not the funds are used 'for the purpose of influencing' a federal election—can raise an appearance of corruption of the candidate." *McConnell v. FEC*, 251 F. Supp. 2d 176, 420 (D.D.C. 2003) (Henderson, J., concurring in judgment in part and dissenting in part) (emphasis added) (citing *U.S. v. UAW*, 352 U.S. 567, 576 (1957)). Member-to-Member solicitations do not raise the "same corruption concerns" of improper influence by the donor that the *McConnell* Court was addressing.

The *McConnell* Court also stated that "restrictions on solicitations are justified as valid anticircumvention measures. ... Without some restriction on solicitations, federal candidates and officeholders could easily avoid FECA's contribution limits by soliciting funds from large donors and restricted sources to like-minded organizations engaging in federal election activities." *McConnell*, 540 U.S. at 182-83. In enacting BCRA's solicitation provisions, Congress was not attempting to prevent Members of Congress from circumventing limits placed on contributions *from other Members* through requests of contributions from those Members to outside organizations. The absence of any potential for corruption in that situation would not justify the restriction, and it was certainly not addressed as a supporting factor by the *McConnell* Court.

It is common for national political party committees, often operating through officers who are Members of Congress, to set fundraising goals or targets for other Members. Because these fundraising goals anticipate multiple permissible contributions, the aggregate, target numbers provided to Members may well be above the limits placed on an individual or entity's separate contributions to the recipient committee. If the Commission were to conclude that Rep. Schock's request that Rep. Cantor raise $25,000 for a pro-Kinzinger ad violated § 441i, that would imply that the long-standing and common practice of Member-to-Member hard money fundraising requests and targets for national party committees are likewise prohibited. That is not a proposition that the Commission has previously adopted, nor do we believe it has even been suggested. And for good reason. Nothing in BCRA or the Commission's regulations

prohibits a Member of Congress from suggesting a hard money fundraising target for another Member.

Rep. Schock asked Rep. Cantor to meet a fundraising target for an independent expenditure-only committee. Rep. Cantor in turn made a donation drawn from federal funds. No violation of FECA resulted, and the Commission should therefore conserve the resources of all concerned by dismissing the complaint.

Respectfully submitted,

Robert K. Kelner
Derek Lawlor
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
(202) 662-6000 (telephone)
(202) 778-5211 (facsimile)
rkelner@cov.com
dlawlor@cov.com

Attorneys for United States Representative Aaron Schock